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November 1, 2005

HAND DELIVERED

Hon. Liane M. Randolph, Chair
Hon. Sheridan Downey III, Commissioner
Hon. Philip Blair, Commissioner
Hon. Ray Remy, Commissioner
Hon. Gene Huguenin, Commissioner
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

RE: Agenda Item No. 6 - November 3, 2005 Agenda

Dear Chair Randolph and Commissioners

The California Republican Party ("CRP") has the following comments on the proposed Advisory Opinion Request to the Federal Election Commission.

Due to the press of business in connection with the upcoming November 8, 2005 election, I am uncertain at this time whether I will be able to attend the Commission's November 3, 2005, meeting, and therefore I have submitted these written comments.¹

The CRP believes much of what the FPPC proposes to do, if not all, is preempted by the Federal Election Campaign Act. The CRP joined with the California Democratic Party in May 2005 to urge the Commission to seek the FEC's opinion on whether or to what extent state regulation is preempted by federal law. The CRP does not support some of the concepts the staff has proposed for regulation of political party federal committee expenditures. Our disagreements were outlined in public comments at the May 15, 2005 FPPC meeting, and are discussed at the end of this letter.

However, the focus of this comment is that the CRP believes the draft Advisory Opinion

¹ CRP understands that the California Democratic Party may suggest a more limited form of voluntary campaign disclosure. CRP concurs with that approach.

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Request letter may not clarify in FEC language what the FPPC really would like to know. Therefore, it may be clearer for the FPPC to simplify the AOR as follows:

Suggested Language for Advisory Opinion Request

"The FPPC is considering a regulation that would provide that when a California state or local political party committee's federal committee is required to expend its funds by 2 USCA § 441i for any public communication that identifies a federal candidate or officeholder that would qualify as Federal Election Activity, which communication also contains express advocacy of the election or defeat of a clearly-identified state or local candidate or ballot measure, the amount the federal committee expends on the portion related to state or local candidates or ballot measures must be reported under the state's campaign disclosure law.

Further, the FPPC is considering a requirement that when the federal and non-federal portions of allocable expenditures for Federal Election Activity or party voter drive and administrative and overhead expenses do not reflect a sufficient non-federal share of such expenses, as determined by the FPPC, what the state determines to be an appropriate non-federal share of such expenses paid by the party federal committee would be reportable by the party federal committee as contributions or expenditures under the state's campaign disclosure law. These requirements would apply to federal hard dollar funds and federal Levin funds of the party federal committee.

The FPPC requests the FEC's opinion on whether such requirements would be preempted by the Federal Election Campaign Act, if the FPPC's regulation contained the following elements:

- A. For Public Communications: If the FPPC establishes an allocation formula for mixed or joint expenditures using a time/space allocation method applicable to express advocacy communications regarding state or local candidate or ballot measures, a party federal committee would be required to report as contributions or independent expenditures the aggregate amount the party federal committee expended without

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reimbursement from the party non-federal committee on each state or local candidate or measure.

- B.² For State Portion of Allocable Federal and Non-federal (State) Expenses: If the FPPC also establishes a state allocation formula for the state or non-federal portion of mixed or joint expenditures by California state or local party committees for voter registration, get-out-the-vote, administrative and overhead expenditures, which may differ from than the applicable FEC allocation formula for a particular election cycle, would require the party federal committee to report such expenditures as state campaign expenditures.
- C. Manner of Reporting Required: The FPPC would require a party federal committee's "contributions" or "independent expenditures" on behalf of state/local candidates or measures to be reported separately on its own state report or on the party committee's non-federal report FPPC Form 460 Recipient Committee Campaign Report, Schedule D, as well as on other campaign reports required for party committees' "late contributions" (Calif. Gov. Code § 84203; FPPC Form 497); "late independent expenditures," (Calif. Gov. Code § 84204; FPPC Form 496); "supplemental pre-election statements" (Calif. Gov. Code § 84202.5; FPPC Form 495); and "supplemental independent expenditures" (Calif. Gov. Code § 84203.5; FPPC Form 465.)
- D. Additional Requirement to Report Federal Committee Donors as Donors on State Reports: The FPPC would also require a party federal committee to attribute to federal donors their portion of its state campaign "expenditures," based upon a pro ration of their donations to the party federal committee that are used for such state campaign purposes. The pro

² This question and question D below could be omitted if the FPPC abandons the more complicated elements of the proposed regulation.

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ration would be based on the percentage of federal expenditures for state purposes as of the total party federal committee expenditures. (For example, if the party federal committee were required to spend \$100,000 of its federal hard dollars or federal Levin funds because of a communication that identifies a federal candidate or officeholder that would qualify as Federal Election Activity because it also promotes, attacks, supports or opposes a federal candidate or officeholder, out of \$1,000,000 in total expenditures, 10% of each federal donor's contribution would be attributed as a state contribution under this approach.)

[INSERT HERE FPPC'S OWN JUSTIFICATION FOR NON-PREEMPTION OF ANY OR ALL OF THE ABOVE]

FPPC Still Doesn't Understand the Scope of Circumstances in Which a Party's Federal Committee Is Required to - or May - Spend Funds on State Campaigns

There are at least three situations in which a political party with federal and non-federal committees and bank accounts ordinarily may expend funds that relate to state or local elections under the current FEC-adopted scheme to implement FECA requirements, as modified by the Bi-Partisan Campaign Reform Act ("BCRA") amendments of 2003:

Endorsements of state/local candidates and measures in a regular public communication (broadcast, mass mailing) that also promotes, attacks, supports or opposes a federal candidate.

A political party's federal committee is required to pay 100% of cost, regardless of how many or the percentage of time or space devoted to state or local candidates or measures in the communication. 2 USCA §§ 441i(b)(A)& (B); 431(20(A)(iii). However, the political party cannot reimburse using its non-federal or federal Levin fund dollars.

In this case, the political party's federal account has made a contribution or independent expenditure relative to all state/local candidates or measures also endorsed or opposed, based upon the proportion of time or space devoted to the mention of each.

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2. Endorsements of state/local candidates and measures(Boling Letter situation) that also promote, attack, support or oppose a federal candidate via slate cards, doorhangers or similar methods are not “public communications” (situation 1 above.)

A political party’s federal committee is required to pay 100% of cost, but the party’s non-federal or state campaign committee may reimburse up to the current election cycle’s non-federal “allocation” percentage. 11 CFR § 106.7(c)(3) [For expenditures that are not “public communications” under 2 USCA §§431(20)(A) or 441i(b)(2)(B) [Note - 2003-04 election cycle non-federal allocation percentage for California was 64%; for 2005-06, the non-federal allocation percentage is 79%.]

Whether a party’s federal committee has made a contribution or independent expenditure relative to all state/local candidates or measures also endorsed or opposed, depends on the proportion of time or space devoted to the mention of each, and collectively, whether this percentage is less or more than the current election cycle’s federal “allocation percentage.

3. A political party’s federal committee pays all the costs of such communications described in 2 or other administrative, voter registration, GOTV expenses but does not reimburse, as permitted in accordance with the FEC’s allocation regulations, from regular state or Federal Levin accounts due to cash flow or other considerations.

A political party’s federal committee is required to pay 100% of such “joint federal/non-federal” expenditures and its non-federal or state campaign committee or its federal committee’s federal Levin account may reimburse up to the current election cycle’s non-federal “allocation” percentage. 11 CFR § 106.7(c)(3) [For expenditures that are not “public communications” under 2 USCA §§ 431(20)(A) or 441i(b)(2)(B) [Note - 2003-04 election cycle non-federal allocation percentage for California was 64%; for 2005-06, the non-federal allocation percentage is 79%.]

Since the party’s non-federal committee has failed or refused to make reimbursements (maybe for cash flow reasons), the political party’s federal committee has made a “contribution” or “independent expenditure” relative to all state/local candidates or measures also endorsed or

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opposed, based on the proportion of time or space devoted to the mention of each.

The FPPC Wants to Regulate a Fourth Situation in Which a Party Federal Committee Would Make Expenditures for State Reporting Purposes

Proposed Regulation 18530.3(b) (Draft 4/19/05, p. 1, lines 17-21) proposes an additional situation in which a political party's federal committee would make expenditures for state reporting purposes. This is described in paragraph B of the suggested language we provide above for the Advisory Opinion Request. Basically, the FPPC proposes to establish its own minimum state percentage for the state or non-federal portion of such expenditures.

The FEC has long provided an allocation for "joint federal and non-federal" expenditures. The FEC's allocation regulations currently are at 11 CFR §106.5 (relating to administrative and overhead, voter drive and fundraising) and 11 CFR § 300.33 (adopted after the BCRA amendments), covering "Federal Election Activity," in particular, voter registration, get-out-the-vote, and "generic party communications.") These regulations cover general rules for allocation of federal and non-federal expenses by party committees and allocation methods for particular types of expenses.

For the 2003-2004 election cycle, California political party committees' allocation ratio for joint federal and non-federal expenditures for administrative and overhead and "Federal Election Activity" were a minimum of 36% federal funds and a maximum of 64% non-federal or federal Levin funds. This formula was based on the fact that in 2004, the federal races on the California ballot included the Presidential and one U.S. Senate election.

For the 2005-2006 election cycle, the ratio is a minimum of 21% federal and 79% non-federal or federal Levin funds, based on the fact we have one U.S. Senate race and no Presidential election. Under these rules, a party's federal committee must pay the entire cost of joint federal and non-federal expenses and may be reimbursed by the party's non-federal or federal Levin accounts up to 64% or 79% (depending on the election cycle involved) of each expense, provided the reimbursement was made in a period between 10 days before the expense was paid to 60 days afterward.

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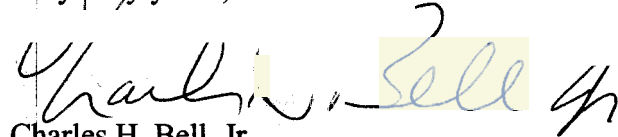
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The concepts underlying the position the staff takes in the proposed Advisory Opinion Request letter are that: (1) the state can, and should, determine for itself what "allocation" percentage is appropriate for a political party's state reporting purposes, even if that state allocation percentage differs from the allocation percentage than the FEC has mandated for "mixed" or "allocable" expenditures, e.g., voter registration, get out the vote, administrative overhead; and (2) if this results in a "contribution" by a political party's federal committee, not only must the political party report that "contribution" (essentially as an "expenditure" but also the political party must then determine what percentage of each federal committee's contributors' contributions must be reported as a state campaign contribution.

In CRP's view, there is no need for the state to second-guess the FEC's allocation formulas. It is likely the FEC will view this assertion of authority as preempted by federal law. If the FPPC "wins" this argument, everyone loses: (1) the public gains no useful information; and (2) campaign treasurers for political party committees would be required essentially to keep a dual set of allocation formulas which would apply to almost all their routine administrative expenses; and to prepare a duplicate calculation of the portion of their federal committee's donors' contributions that would have to be reported on state campaign reports.

For these reasons, the CRP urges the FPPC to abandon the more complicated approaches of proposed regulation 18530.3. If it were to do so, parts B and D of the proposed re-write of the Advisory Opinion Request could be dropped.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Charles H. Bell, Jr.", with a stylized flourish at the end.

Charles H. Bell, Jr.
General Counsel to the California Republican Party

CHB/jg